

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-186051

DATE: July 9, 1976

MATTER OF: Teledyne Walterboro

DIGEST:

1. Statement of fact concerning performance on prior contracts inserted in bid at end of first article provision did not render bid nonresponsive.
2. Only reasonable interpretation of notation, "MAX. ALLOWABLE PROGRESS PAYMENTS REQUIRED," on bid is that it is request for 85 percent progress payments in IFB, since nothing in bid indicates request was made to obtain "unusual" progress payments in excess of IFB limit in accordance with ASPR Appendix E-505 requirements.
3. Protest involving affirmative determination of responsibility is not for review.

Invitation for bids (IFB) number DAAE07-76-B-1608, as amended, was issued by the United States Army Tank-Automotive Command to solicit bids to furnish 300 AMP generators.

Three bids were received. Minowitz Manufacturing Company (Minowitz) was the low bidder. A preaward survey resulted in an affirmative determination of Minowitz's responsibility.

Teledyne Walterboro (Teledyne), the second low bidder, protests the award of the contract to Minowitz. Teledyne argues that Minowitz is not responsive to the solicitation because it has allegedly qualified both the solicitation's first article testing requirements and progress payments provisions. In addition, Teledyne contends that Minowitz is not a responsible bidder.

The IFB as originally issued provided for bidding on the basis of first article approval and waiver of first article approval with the determination as to whether waiver would be granted resting with the Government. Bidders wishing to be considered for waiver

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were requested to provide information as to prior first article approval or Government acceptance of identical or similar supplies. Minowitz bid on both bases and inserted the following notation at the end of the first article provision: "PREPRODUCTION WAS RUN ON CONTRACT DAAE07-74-C-3353. FIRST PRODUCTION WAS RUN ON CONTRACT DAAE07-75-C-3687 AND WAS COMPLETED 12-10-1975."

The first article provision was changed by two subsequent amendments which both contained a paragraph as follows:

"For the purposes of this solicitation, First Article Approval will be required by the successful contractor. The price set forth on page 11 must include First Article Approval. Waiver of First Article Approval Test will not be authorized."

Teledyne contends that the notation Minowitz inserted in the bid produced an ambiguity as to Minowitz's willingness to perform first article testing and that the bid must therefore be considered nonresponsive.

However, the notation in issue, submitted before the issuance of any amendment, is merely a statement of fact concerning performance on prior contracts. While the information apparently was furnished to support a waiver of first article approval by the Government, there is nothing in the notation which qualifies the bid or requires award on the waiver basis alone. As noted above, Minowitz offered prices on both a first article approval basis and a waiver basis. Under the original IFB, the option as to which one would be accepted remained with the Government. Under the amendments, the Government provided that first article approval would be accepted. Thus, under the IFB as issued or as amended, the Government could require first article approval. As we find nothing in the Minowitz bid that suggests anything to the contrary, we are unable to conclude that it was nonresponsive to the IFB.

Concerning Minowitz's responsiveness to the progress payments provisions, the following sections of the Armed Service Procurement Regulations (ASPR) were made applicable to the solicitation by IFB clauses C-20, L-10, and L-11, respectively: ASPR § 7-2003.63 (1975 ed.) "Progress Payments Exclusively for Small Business," ASPR § 7-104.35 (a) (1975 ed.) "Progress Payment Clause for Other Than Small Business Concerns," and ASPR § 7-104.35(b) (1975 ed.) "Progress Payment Clause for Small Business Concerns." ASPR § 7-104.35(b) (1975 ed.), applicable to Minowitz, which is a small business, provides in part as follows:

"(a) Computation of Amounts

(1) Unless a smaller amount is requested, each progress payment shall be (i) eighty-five percent (85%) of the amount of the Contractor's total costs incurred under this contract, except as provided herein with respect to costs of pension contributions, plus (ii) the amount of progress payments to subcontractors as provided in (j) below; all less the sum of previous progress payments. * * *

Adjacent to clause C-20 of the IFB, Minowitz inserted the following notation: "MAX. ALLOWABLE PROGRESS PAYMENTS REQUIRED." Teledyne contends that the notation could indicate that Minowitz was either attempting to obtain the progress payments allowed under the IFB or was requiring the Government to provide the extraordinary progress payments provided by ASPR Appendix E-505 (1975 ed.). That regulation contemplates "unusual" progress payments in excess of the 85-percent limit in exceptional circumstances approved by a designated official. Teledyne contends that the language utilized by Minowitz is, therefore, '* * * ambiguous at best, and * * * Minowitz's bid must be treated as non-responsive."

We do not believe that the notation inserted by Minowitz rendered the bid ambiguous. The only reasonable interpretation of the notation is that it is a request for the 85 percent progress payments in the IFB. This is because ASPR Appendix E-505 requires the "contractor" seeking "unusual" progress payments "to demonstrate fully his actual need" and provides that "such cases must involve a preparatory period requiring contractor's predelivery expenditures that are large in relation to the contract price and in relation to the contractor's working capital and credit," and Minowitz has furnished nothing with its bid to demonstrate the need. In fact, that would have been impossible to do, since the required "preparatory period" would not have occurred. If Minowitz had furnished some kind of documentation, that might have suggested that it was making the request prematurely. However, it did not do that. Accordingly, the Minowitz bid was responsive to the progress payments provision. The decision in 47 Comp. Gen. 496 (1968), cited by Teledyne, is clearly distinguishable. In that case, at page 499, we stated:

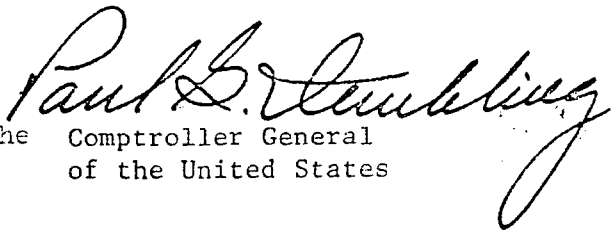
"We are of the opinion that a bid actually conditioned on the receipt of 75 percent progress payments submitted in response to an invitation providing for 70 percent is nonresponsive * * *." (Emphasis added.)

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In contrast, and essentially as stated above, Minowitz has "conditioned" its bid on nothing other than receipt of that which was provided in the IFB.

Finally, regarding the issue of Minowitz's responsibility, Teledyne argues that on the basis of past performances on contracts for items similar to those being procured here an affirmative determination of responsibility concerning Minowitz constitutes "* * * an abuse of discretion so severe as to justify review by * * *" the General Accounting Office. However, this Office does not review protests against affirmative determinations of responsibility, unless either fraud is alleged on the part of procuring officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied. See Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64.

Accordingly, Teledyne's protest is denied.


For the Comptroller General
of the United States